IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:12.02.2007

CORAM

THE HONOURABLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No. 1278 of 2006
&
M.P.Nos.1 & 2 of 2006

1.Karuppa gounder
2.Velusamy
3.Duraisamy
4.Magudeswaran . . Appellants/Defendants

Versus

Soundaram . . . Respondent/Plaintiffs

Prayer:This second appeal is filed under Section 100 of CPC against the judgment and decree dated 18.01.2006 made in A.S.No.86 of 2005 on the file of the I Additional Sub Court of Erode District at Erode and conforming the judgment and decree dated 25.08.2005 made in O.S.No.416 of 2003 on the file of the II Additional District Munsif Court at Erode, Erode District.

For Appellants :Mr. T. Dhanasekarn for
Mr.Ma.P.Thangavel
For Respondent :Mr. P. Valliappan

JUDGMENT

The unsuccessful defendants in both the courts below have filed the present appeal.

2.I have heard the learned counsel for the appellants as well as the respondent.

3.The Respondent filed the suit in O.S.No.416/2003 on the file of the II Additional District Munsif Court, Erode, with a prayer for permanent injunction against the defendants/appellants from obliterating or obstructing the plaintiff's/respondent's user of the suit channel to irrigate her field situate in R.S.No.1470/8

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of Vadugapatti Village from the well water situate in R.S.Nos.1471/1 and 13 of the said village and also for a permanent injunction against the defendants restraining them from obstructing the plaintiff's right to take water in the well situate in R.S.No.1470/9 for two days out of every 9 days.

4.The defendants have filed the written statement. In the written statement while admitting the existence of the common channel, the defendants would state that the entire channel has extended up to a particular portion, namely 'F' portion. It is also admitted that the advocate commissioner has given a finding about the existence of the common channel in the form of Uthi. The defendants/appellants have stated that the plaintiff/respondent has not co-operated with the defendants for de-silting in the common well situate in R.S.No.1470/9, however denying the plea of the plaintiff that the common well situate in R.S.No.1470/9 has dried. It is after trial the trial court as well as the appellate Court have found that factually the well situate in plaintiff's exclusive property situate in R.S.Nos.1471/1 and 13 wherein abundant water is available, from where the plaintiff has taken the water under the common channel by way of pipeline to the another exclusive plaintiff's property situate in R.S.No.1470/8.

5.On the other hand it is admitted that the well which is situate in R.S.No.1470/9 is common to plaintiff and defendants as co-owners wherein each of them having 2/9th share. Apart from that 5/9th share given to the third parties.

6.The grievance of the defendants/appellants which is now raised at the second appeal stage is that the plaintiff/respondent is not co-operating for de-silting the common well which is situate in R.S.No.1470/9. Instead of doing that the conduct of the plaintiff in taking water from exclusive property situate in R.S.Nos.1471/1 and 13 through the common channel to her another portion of exclusive property situate in R.S.No.1470/8 indirectly affect the right of the co-owners in using the common channel.

7.On the other hand a reference to the judgments of both the courts below would show that it is not as if the plaintiff has been using the water from the common well situate in R.S.No.1470/9 in which the plaintiff and the defendants are co-sharer. As it is found by both the courts below based on the advocate commissioner's report that the water is being taken from the exclusive property of the plaintiff/respondent situate in R.S.Nos.1471/1 and 13 under the common channel by pipeline so as to reach the plaintiff's another exclusive property situate in R.S.No.1470/8. Therefore, it is clear that the contention raised on behalf of the learned counsel for the appellants as if the conduct of the respondent affected the right of the co-owners from drawing water from the common well is not well founded for the

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simple reason that this was never be the issue before the Courts below. But it is the only grievance of the defendants that the common well situate in R.S.No.1470/9 has been made unusable by the conduct of the plaintiff in not co-operating for de-silting the same. It is always open to the defendants to work out their remedy under law. When that was not the issue before the Courts below, in this case, I do not think that the appellants can be permitted to raise the same at this point of time. On the other hand, as I have directed above, both the courts below have found that the water has been taken from the well belonging to the plaintiff to the another exclusive land of the plaintiff by the pipeline and that does not affect the right of the defendants in any manner. In view of the same both the Courts below have correctly arrived at the conclusion regarding granting of injunction in favour of the plaintiff.

8.The learned counsel for the respondents would rely upon the judgment of this Court rendered in AIR 1973 MADRAS 42 (SUBBIAH v. RAMASWAMY)= 1972 TLNJ 138 wherein this Court, dealing with the Easement Act in respect of the right of co-owners, in a categoric term has held that right to take water from common well by common channel by turn is the right available to other co-owners except when it detrimentally affects the other co-owners. In fact in the said judgment this Court has placed reliance on the earlier judgment reported in 1968 1 MAD LJ 397 (KARUPPA GOUNDER v. MUTHUSAMI GOUNDER) and extracted the wordings of the judgment of the said case which are as follows;

> "Each co-owner is entitled to enjoy the common property in the best and most advantageous manner so long as there is no invasion or infringement of the rights of the other co-owner or co-owners. It is not open to the plaintiff to dictate to the defendants as to how best the defendant is to enjoy his rights to take water from the well, of which he is a co-owner, having half share therein. If, however, by the defendant enjoying his right to take water from the well, there is a substantial deprivation or infringement of the rights of the plaintiff, in the sense that the plaintiff is effectively prevented from enjoying his right to take water from the well the plaintiff may have a cause of action."

After considering the legal points on the basis of the easement act, this Court in AIR 1973 MADRAS 42 has held in categoric term as follows;

> "Each of such co-owners of the common property is entitled to use the property in the way most advantageous and beneficial to him

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> without, at the same time causing any injury or detriment to the other co-owners. It is for such a co-owner to decide in what way he could so use the common property to his maximum advantage. It is not for the other co-owners to dictate in what manner the other co-owner should enjoy the common property so long as the user of the common property by one co-owners does not materially interfere with the use of the property by the other co-owners or affect their rights or in any way weaken, damage or injure the common property. Such co-owners are not entitled to prevent the other co-owners from using the common property in the way most beneficial to him."

As I have stated earlier, out of 9 turns, the plaintiff/respondent can use the common well for 2 turns which is not denied by the defendants/appellants any where. The plaintiff/respondent is not even using the water in the common well. Admittedly the plaintiff/respondent is taking water from the well situate in R.S.Nos.1471/1 and 13, which is the exclusive property of the plaintiff, through the common channel by pipeline to another exclusive property of the plaintiff/respondent situate in R.S.No.1470/8. When the law is settled even in respect of the common well, the right to use of the co-owners is available, in the case on hand, inasmuch as the use of water was not even from the common well and it is from a private well belonging to the plaintiff situate at R.S.Nos.1471/1 & 13, there is absolutely no reason for the defendants to complain about the conduct of the plaintiff at all.

9.In view of the above said facts and circumstance of the case, I do not find no reason to interfere with the findings of the Courts below and there is absolutely no question of law much less than substantial question of law. In view of the same, the second appeal fails and the same is dismissed. Consequently, connected M.Ps. are closed.

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Asst.Registrar

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Sub Asst.Registrar

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To
The I Additional Subordinate Judge,
2. The II Additional District Munsif Court, Erode

+ one cc to Mr. P. Valliappan, Advocate sr no. 8494
+ one cc to Mr. P. Thangavel, Advocate sr no. 8531

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